Supreme Court, U.S.
FILED

04 16 04 MAY 27 2005

OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

Undra R. Ware,

Petitioner,

v.

State of Oklahoma, ex rel. Oklahoma Merit Protection Commission and Oklahoma Department of Human Services,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was dismissed from her position at the Oklahoma Department of Human Services ("DHS") on August 3, 2002. She was advised of her appellate rights, and made timely use of that information until the State interrupted its flow of information. After that flow of information halted, she appealed an adverse decision to the Tulsa County District Court using what information she had available to her. Respondent filed a motion to dismiss based upon grounds of timeliness.

After a briefing of the issues, the District Court on September 23, 2004, issued its Final Order, granting Respondent's Motion to Dismiss on grounds of timeliness. Petitioner appealed, and the Oklahoma Court of Civil Appeals ("COCA") rendered its decision affirming the Final Order of the District Court on December 27, 2004.

Petitioner filed a Petition for Certiorari to the Oklahoma Supreme Court on January 19, 2005, which was denied on March 7, 2005.

The instant Petition presents the following questions for review.

1. Whether the Court below misconceived and misconstrued the rule concerning procedural due process and equal protection under the law pursuant to this Court's rulings on those issues.
2. Whether as a result of that misconception and misconstruction Petitioner, as a pro se, in forma pauperis litigant, was deprived of her Constitutional right to procedural due process.
3. Whether as a result of that misconception and misconstruction Petitioner, as a pro se, in forma pauperis litigant, was deprived of her Constitutional right to equal protection under the law.

LIST OF PARTIES

The parties are as set out in the style of this case, although the Oklahoma Merit Protection Commission ("MPC") has disclaimed real-party-in-interest status.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual, without corporate status.

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OPINIONS BELOW

None of the Orders issued in the instant case have been reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction rests of 28 USC 1257 (a). The Orders under review are those of the Oklahoma Court of Civil Appeals, December 27, 2004, Case No. 101, 346, and the Final Order of the District Court, Tulsa County, September 23, 2004, Case No. CJ-2003-1660.

CONSTITUTIONAL AND STATUTORY PROVISIONS

At issue are the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, which provide in pertinent part: "No State shall…deprive any person of…property without due process of law…nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was terminated from her position at the Oklahoma Department of Human Services ("DHS" or "Respondent") as a Direct Care Specialist II on August 3, 2002, and was advised of her right of appeal to the Oklahoma Merit Protection Commission ("MPC"). Petitioner timely appealed her termination to the MPC.

On November 19, 2002, the MPC upheld the decision of the DHS to fire Petitioner, advising Petitioner of her right to ask the MPC for reconsideration within ten (10) days. Petitioner timely sought reconsideration of the decision of November 19, 2002, pursuant to the notice she received from the MPC. The MPC denied Petitioner's requested relief by an Order filed on February 3, 2003. No notice was given her of her further appellate rights.

Petitioner, as an in forma pauperis, pro se party, within the ten (10) day timetable of which she had been previously apprised, sought reconsideration—the only appellate avenue of which she was aware--from the MPC of the Order of February 3, 2003.

In response to that second request for reconsideration, and only in response to that second request for reconsideration, the MPC sent Petitioner a letter advising her that she appeared to have filed another Petition for Reconsideration, that "[t]he findings of the presiding official shall be final and conclusive," and that "[w]ithin 30 calendar days after exhausting all remedies under the Administrative Procedures Act, either party may appeal to a higher court."

In the very next line of the letter, she was advised that "[y]ou have exhausted all remedies with the Commission. You may appeal to a higher court."

Petitioner did what the letter directed. She filed her appeal "to the district court within thirty (30) calendar days" of her receipt of the letter. That appeal was dismissed for lack of prosecution on June 24, 2003; the District Court vacated its dismissal on July 28, 2004.

After a briefing of the issues, the District Court on September 23, 2004, issued its Final Order, granting the Motion to Dismiss of DHS on grounds of timeliness. Petitioner appealed, and the Oklahoma Court of Civil Appeals ("COCA") rendered its decision affirming the Final Order of the District Court on December 27, 2004.

As soon as Respondent filed a Motion to Dismiss based upon the grounds of timeliness, Petitioner raised the Constitutional issues in Tulsa County District Court, and has never ceased to argue those grounds in order to avoid dismissal of her case.

REASONS FOR GRANTING THE WRIT

The issue before the Court today is whether in the interests of fundamental notions of justice the appellate process employed in the instant case gave Petitioner all that was her due as an in forma pauperis, pro se litigant. Petitioner's position is that she was not accorded Constitutional fairness in the process because her right to

equal protection under the law was seriously breached and because of a violation of her right of procedural due process.

It is important to note that two elements of Petitioner's case were not contested below. The first is that of State action. The State of Oklahoma set the rules for MPC proceedings, it applies those rules, and it enforces those rules, and Petitioner was a State employee. Respondent has never claimed that Petitioner was not subject to State action in the instant case.

Second, as a State employee, Petitioner had a property interest in retaining her job. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-39 (1985) (state employees have "property rights in continued employment"); *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 11 fn.11 (1978). Respondent has never claimed otherwise.

Petitioner's case was thrown out in State court on a motion to dismiss. This Court has repeatedly instructed that "[i]t is axiomatic that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Loudermill*, 470 U.S. at 554, *citing McLain v. Real Estate Bd. Of New Orleans, Inc.*, 444 U.S. 232, 246 (1980). As Petitioner will show, given the Constitutional dimension of the issues that she raised below, this matter should have been heard on its merits.

COCA, in its Order denying Petitioner's requested relief (Appendix B), responded to Petitioner's argument in two ways. First, it rejected Petitioner's claim that she was denied due process, asserting that she had been given notice of her right to appeal. Second, it failed to address at all Petitioner's argument that she was denied equal protection under the law.

It is Petitioner's contention that the Oklahoma Supreme Court, in affirming the decision of COCA which denied Petitioner her requested relief, misconceived the

standard set by the Constitution of the United States, as well as that of Oklahoma, for due process and equal protection.

I. THE COURT BELOW MISCONCEIVED THE STANDARD FOR DUE PROCESS

The Oklahoma courts construed the standard for due process to be a mere matter of pro forma notice to a party, without regard to its adequacy, i.e., notice in the abstract rather than "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted). The Oklahoma courts ignored this Court's admonition that "[t]he notice must be of such nature as reasonably to convey the required information." *Id., citing Grannis v. Ordean*, 234 U.S. 385. In fact, the *Mullane* court made it unmistakably clear that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

In the instant case, Petitioner was provided notice of her right of review at each of the preliminary steps of her grievance under the Merit Protection Rules. She was suddenly, and without fault of her own, denied notice of her rights at the third step of the grievance process. Specifically, she was given crucial information at the first two steps of the administrative process concerning appellate deadlines. But at the critical third stage, without warning, the MPC withheld that information from her.

Petitioner nonetheless made every effort within her grasp to protect her rights. She took the only step of which she had had any notice, namely the ten (10) day period within which she had already been advised she could ask for reconsideration, and requested reconsideration a second time. DHS, in response--and only in response--to Petitioner's

second request for reconsideration, sent her a letter on February 13, 2003 (Appendix D), two weeks after her time had started to run, advising her that, oh, by the way, you do have appellate rights.

That notice, however, was not only late, but also fraught with ambiguity as to the timing of the rights of which it was advising Petitioner. The letter of February 13 advises Petitioner that, following a vote of "the Commissioners" denying her Petition for Reconsideration, she "appears" to have filed "another Petition for Reconsideration." It goes on to cite Title 74 of the Oklahoma Statutes to the effect that "[t]he findings of the presiding official shall be final and conclusive," without any indication of just who that "presiding official" might be. "Such decision (sic) are subject to judicial review if appealed to the district court within thirty (30) calendar days."

Immediately following this indeterminate identification of Petitioner's rights, the MPC cites Merit Rule 455:10-3-20(h), apparently in explanation of its citation of Title 74: "[w]ithin 30 calendar days after exhausting all remedies under the Administrative Procedures Act, either party may appeal to a higher court." **Immediately following** this information, Petitioner is further informed, "[y]ou **have** exhausted all remedies with the Commission. You may appeal to a higher court" (emphasis added).

Notwithstanding the declaration of DHS in its Motion to Dismiss that this letter "was not a new appealable final order," it is not surprising that Petitioner took it to be the appealable event from which the "30 calendar days" ran.

In is clear that Petitioner made every good faith effort that was within her knowledge and ability. That, together with an inadequate notice, is all she is required to do under the law in order to preserve her right to access to the appellate process. *Memphis Light* 436 U.S. at, 2, 5, 15 (notice must comport with Constitutional requirements; otherwise, good faith efforts suffice).

The letter upon which Respondent relies speaks, first, of "**the Commissioners**" as the decisionmaking body from which Petitioner must exercise her right of appeal. It then speaks of a "**presiding official**" from whose decision Petitioner must appeal. Finally, **the writer of the letter** herself advises Petitioner that she has exhausted her remedies and may appeal.

The letter does not spell out the fact that Petitioner's second Petition for Reconsideration is not a proper Petition. When it therefore identifies the decision from which Petitioner must appeal as "**[s]uch decision,**" it is very unclear that it is not the decision that the letter writer **herself** renders in the final paragraph in response to that second Petition for Reconsideration: "You have exhausted all remedies with the Commission. You may appeal to a higher court."

Such notice, ambiguous and confusing, at the very least, cannot as a matter of law rise to the threshold necessary to pass Constitutional muster as proper notice under Amendment XIV. *Memphis Light* 436 U.S. at 14-15 (notice must "permit adequate preparation for an impending 'hearing'"; must be "clear"; "does not comport with constitutional requirements when it does not advise...of the availability of a procedure"). Moreover, those procedures cannot operate on an ad hoc basis, as they did in the instant case when Petitioner was advised of her rights only in response to an initial contact on her part with the MPC. *Memphis Light*, 436 U.S. at 12 (procedure must be such as not only to permit adequate notice, but must be "established").

It is apparent that the Oklahoma courts--in holding that "[a]lthough the order denying [Petitioner's] Petition for Review did not specifically advise her of the time limit on her right to judicial review, the letter...did" (Appendix B)--believe that the Constitution requires only pro forma notice, and **not** "notice reasonably calculated, under all the

circumstances, to apprise interested parties" of their appellate rights.

Ironically, Respondent points to Petitioner's untimeliness to excuse its own. Under the Oklahoma court's analysis, Petitioner could have been advised-of her rights on the 29th day of the 30 day period, and the notice would have been adequate. *Atkins v. Parker*, 472 U.S. 115, 131, fn. 34 (1985) ("unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption") (citations omitted).

The United States Constitution explicitly commands that no one is to be deprived of life, liberty, or property without due process. This is meaningless if it is read to mean that a party has right to proper notice through only a portion of the process, not its entirety. Here a pro se party lost an essential right to an independent judicial review because the Oklahoma courts misconstrued the Constitutional standard under which the State should have been made to labor, and her right to due process under the United States Constitution was seriously violated. Although this is true under the facts as they are above recited, it is more emphatically so because in this instance those rights are as a matter of course accorded other similarly situated plaintiffs.

II THE COURT BELOW MISCONCEIVED THE STANDARD FOR EQUAL PROTECTION UNDER THE LAW

The Oklahoma Supreme Court made very clear in *Simpson v. Dixon* that Oklahoma's Constitution "*explicitly* commands uniformity of procedure." 1993 OK 71, 853 P.2d 176; *see also Brown v. Ford,* 1995 OK 101, 905 P. 2d 223 *citing* Okl. Const. Art. V, section 46; *Johnson v. District Court of Oklahoma Co,* 738 P.2d 151, 154 (OK 1987) (Opala, J., concurring). That Constitutional provision commands "that general rules of appellate procedure be *symmetrical* and apply across the board." *Johnson v.*

Tony's Town Mister Quik, 1996 OK 138, paragraph 5, 915 P.2d 355, 357.

This requirement is not limited to notice of an impending hearing, but includes the right to notice of an appealable event. *Joiner v. Brown*, 1996 OK 112, § 10, 925 P.2d 888 ("Notice of the date an appealable event occurs is critical to ensuring the right of appeal to the parties.") The *Joiner* Court so ruled even though no statute governed the Court's requirement that notice be given. *Id.*at § 7 ("While there is no explicit statutory requirement for Brown's lawyer to comply with the request [for notice of the appealable event], it is *plainly unconscionable* for a licensed practitioner [to deny that notice].") *See also Davis v. GHS Health Maintenance Organization, Inc.*, 2001 OK 3, § 1, 22 P.3d 1204 ("Because the HMO did not inform the insured of review or appeal rights in its denial letter...insured, who has not pursued administrative remedies, may file a bad faith action in district court."); *Elwood v. Associated Milk Producers, Inc.*,1974 OK 129, §9, 547 P.2d 1315 ("Appellee was advised of his automatic right to appeal the 'no action' decision to the 'Supply-Management Committee for the Southern Region' of Petitioner, as was provided for in the 'Rules of Practice and Procedure of Supply-Management Committee, Associated Milk Producers, Inc.'")

When an unsuccessful party in an administrative proceeding before the Oklahoma Department of Labor ("DOL") finishes the stage immediately prior to that in which judicial review must be invoked, he is informed of his appellate deadlines in writing in a prominently displayed Notification of Appeal Rights in the very Agency Determination that notifies him that he has not prevailed before the DOL.

When a party to an action before the Oklahoma Employment Commission ("OESC") receives the final Opinion of the OESC Board of Review, that document contains his Appeal Rights prominently displayed; that is, an

Petitioner encounters his right to judicial appeal even before he reads the Opinion from which the appeal must be taken.

And in the case of an ABLE hearing, the pertinent Commission "is under a legislative mandate to set up procedures to protect the right of aggrieved persons to exercise [the] right of appeal to [that] Commission. 37 OS Supp. 1987 §§ 508 and 529." *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Com'n*, 1988 OK 117, § 6, 764 P.2d 172.

It is important to note that the Court's rulings in the above-cited cases concern matters based upon mere extra-statutory practices and rules that give the parties a right to notice, as in the instant case. Each of these parties is a member of the class of all persons who fall under the aegis of the State of Oklahoma administrative system and are therefore forced to resort to administrative law. Each such party has his right of notice equally protected by the administrative agency from which he has received an adverse ruling.

Whether governed by rule, practice, custom, or statute, therefore, equal, uniform, and unimpeded access to judicial review must be accorded to all final agency orders. But Petitioner, a pro se member of the same administrative class as those examined above, was denied that access by the MPC and was therefore denied not only her due process rights, but her right to equal protection under the law.

That this accords with the federal Constitutional standard is supported by this Court's reasoning in *M.L.B.* "The Court's decisions concerning equal access to judicial process...reflect both equal protection and due process concerns....In these cases, [d]ue process and equal protection principles converge." *M.L.B. v. S.L.J., individually and as next friend of the minor children, S.L. and M.L.J. ex ux.*, _____ U.S. _____ (1986). The Court elaborates that although there is no federal right to appellate review, "once a State affords that right...the State may not 'bolt the

door to equal justice.'" *Id.* The Court reasons that in cases "involving state controls or intrusions on family relationships," which is to say "association[s] 'of basic importance in our society,'" it must balance the interests of the State against those of the individual to determine whether an equal protection analysis is warranted.

Here, the individual's interest--because it is based on employment, an "association...of basic importance" by any measure--in receiving such notice is enormous. This very case makes clear that failing such notice a plaintiff loses the right of appeal forever. *See, e.g., Memphis Light*, 436 U.S. at 20. As Justice White wrote in *Loudermill*, "the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood....While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Loudermill*, 470 U.S. at 543 (citations omitted).

Justice Marshall, in his concurrence in part and in the judgement, gave this idea even greater emphasis when he called "the disruption caused by a loss of wages" so significant as to be "devastating." *Id.* at 549.

Conversely, the State's interest in maintaining the status quo is slight at best. The only burden on the State is that it require in the case of a DHS appellant what it already grants its other administrative appellants. The hardship and expense to the State are simply those of writing a short, unambiguous paragraph apprising the parties to a DHS adversarial proceeding of their appellate rights at the final stage of that proceeding, and then spending whatever it costs in ink to add that paragraph to all its final administrative orders.

Even if Oklahoma law were to declare that equal protection guarantees were not available to Petitioner in

protection guarantees were not available to Petitioner in Oklahoma, which is precisely what the Oklahoma courts have in effect declared by refusing to even respond to Petitioner's equal protection arguments, the instant Court has explained that minimum Constitutional requirements are "a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate." *Loudermill*, 470 U.S. at 541; *see also Memphis Light*, 436 U.S. at 9.

By misconceiving the requirement of equal protection under the law, then, and simply ignoring the serious Constitutional issues raised by Petitioner as to her right to equal protection, the Oklahoma's courts have denied her the independent judicial review that is her right under the United States Constitution.

CONCLUSION

It is abundantly clear that Petitioner's Constitutional rights to due process and equal protection under the law were denied her, and that the Oklahoma courts misconstrued the standard which they should have applied in the instant case. Petitioner respectfully prays the Court grant her a writ of certiorari in order to entertain the further merits of her position.

Respectfully submitted,

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FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 7 2005
MICHAEL S. RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Monday, March 7, 2005

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

101,346 Undra R. Ware v. State of Oklahoma, ex rel., Oklahoma Merit Protection Commission & Oklahoma Department of Human Services
Petition for certiorari is denied.
ALL JUSTICES CONCUR

s/ Joseph M. Watt

Chief Justice

APPENDIX A

FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 27 2004
MICHAEL S. RICHIE
CLERK

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA DIVISION III

UNDRA R. WARE,	)	
	)	
Petitioner/Appellant,	)	Case No. 101,346
vs.	)	
	)	
STATE OF OKLAHOMA ex rel., OKLAHOMA MERIT PROTECTION COMMISSION and OKLAHOMA DEPARTMENT OF HUMAN SERVICES,	)	
	)	
Respondents/Appellees.	)	

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA HONORABLE GREGORY K. FRIZZELL, TRIAL JUDGE

Robert S. Coffey, For Petitioner/Appellant,

For Respondent/Appellee,
Asst. Attorney General, Oklahoma City, Oklahoma — Oklahoma Merit Protection Commission,

Richard A. Resetaritz, Asst. General Counsel, Oklahoma City, Oklahoma — For Respondent/Appellee, Oklahoma Department of Human Services.

APPENDIX B-1

OPINION BY CAROL M. HANSEN, Judge:

¶1 After several incidents, the Oklahoma Department of Human Services (DHS) terminated Petitioner Undra Ware's employment. She sought review by the Oklahoma Merit Protection Commission which upheld her firing on November 19, 2002. Attached to the agency determination judgment was a statement advising her the decision was open for reconsideration by the agency within ten days of its entry. On November 27, Ms. Ware filed a Petition for Reconsideration. The Commission denied reconsideration on February 3, 2003.

¶2 On February 11, 2003, Ms. Ware attempted to file a second petition for reconsideration. The Human Resources Programs' Manager of the Commission wrote her a letter pointing out she had 30 days from the denial of her Petition for Reconsideration in which to seek a judicial review by the district court. It advised her she had exhausted all her remedies with the Commission.

¶3 Ms. Ware filed a Petition for Judicial Review on March 12 2003, more than 30 days from the day she received the order denying her Petition for Reconsideration. DHS filed a motion to dismiss[1], pointing out Ms. Ware neither served the petition on DHS or the Commission nor filed a Notice of Filing as required by 75 O.S. 2001 § 318.2 In addition, DHS argued because the order denying Ms. Ware's petition for

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[1] The Merit Protection Commission filed a pleading stating it was not a real party in interest and it planned to play no active role in the proceedings.

[2] Ms. Ware also filed a lawsuit against DHS in federal court on January 14, 2003. The court dismissed the complaint on July 23, 2003.

reconsideration was dated February 3, her request for relief from district court was untimely. It cited § 317 of the Oklahoma Administrative Procedures Act 75 O.S. 2001 §250 et. seq. which provides:

> E. If an application for rehearing shall be timely filed, the period within which judicial review, under the applicable statute, must be sought, shall run from the final disposition of such application.

Section 318 (B)(2) provides:

> In all other instances, proceedings for review shall be instituted by filing a petition, in the district court of the county in which the party seeking review resides or at the option of such party, where the property interest affected is situated, within thirty (30) days after the appellant is notified of the final agency order as provided in Section 3123 of this title.

¶4 Ms. Ware responded claiming DHS should be estopped from raising a timeliness defense on equitable grounds. She argued she was invoking a constitutional remedy – that of procedural inadequacy of notice of the deadline she had to meet in order to make a timely appeal. She claimed she was not accorded fairness in the process. She cited numerous decisions wherein courts have upheld the necessity of due process notice. She believed the letter from the Human Resources Manager was a new appealable final order from which date the 30 days began to run.

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[3] This section sets out the requirements of a final order.

¶5 While we agree wit the decisions emphasizing the requirement of due process notice, we do not agree adequate notice was not given. Although the order denying her Petition for Reconsideration did not specifically advise her of the time limit on her right to judicial review, the letter from the Human Resources Manager did.

¶6 The time for Ms. Ware to file a Petition for Judicial Review under the Administrative Procedures Act ran 30 days from January 30, 2003, the date the Merit Protection Commission denied her Petition for Reconsideration. She filed her Petition for Judicial Review on March 12, 2003.Sections 312 and 318 do not require a statement in its order advising the litigant of the time limits for judicial review.

¶7 It is well established the time limits within which to appeal from an adverse decision are jurisdictional in nature and if an appeal is brought untimely, the court has no power to decide the case. *This rule applies to judicial review of administrative actions to the same extent as it does to court judgments and decrees.* (Emphasis supplied). *Conoco, Inc. v. State Department of Health,* 1982 OK 94, 651 P.2d 125. The procedural requirements of the Administrative Procedures Act are mandatory and must be complied with before a district court can acquire jurisdiction for review. *Oklahoma Employment Security Commission v. Emergency Physicians, Inc.*, 1981 OK 82, 631 P.2d 743. It is clear Ms. Ware not only did not timely file her Petition for Judicial Review, she did not meet other requirements for such review.

¶8 Accordingly, we affirm the trial court's dismissal of her

petition.

AFFIRMED

JOPLIN, J., and MITCHELL, P.J., concur.
AFFIRMED

DISTRICT COURT
FILED
SEP 23 2004
SALLY HOWE SMITH,
COURT CLERK
STATE OF OKLAHOMA,
COUNTY OF TULSA

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY, STATE OF OKLAHOMA

UNDRA R. WARE,	)	
	)	
Petitioner/Appellant,	)	Case No. CJ-2003-1660-Frizzell
	)	
vs.	)	
	)	
OKLAHOMA DEPARTMENT OF HUMAN SERVICES, and MERIT PROTECTION COMMISSION,	)	
	)	
Respondents/Appellees.	)	

FINAL ORDER

Before the Court is the Motion to Dismiss of Respondent/Appellee Oklahoma Department of Human Services.

Upon review of the briefs filed by the parties, the Motion to Dismiss of Respondent/Appellee Oklahoma Department of Human Resources is granted, as this administrative appeal is untimely.

IT IS SO ORDERED this 23rd day of September, 2004.

s/ Gregory K. Frizzell

GREGORY K. FRIZZELL
DISTRICT JUDGE

APPENDIX C

[SEAL OF THE STATE OF OKLAHOMA]

James L. Howard
Executive Director
OKLAHOMA MERIT PROTECTION COMMISSION
201 N.E. 38th Terrace, Suite 5Oklahoma City, Oklahoma 73105
(405) 525-9144

February 13, 2003

Undra R. Ware
P.O. Box 2723
Tulsa, OK 74101

Re: MPC 03-076, Undra R.Ware v. Department of Human Services

Dear Ms. Ware:

On January 30, 2003, the Commissioners voted to deny your Petition for Reconsideration. An order regarding this denial was issued on February 3, 2003. On February 13, 2003, you filed what appears to be another Petition for Reconsideration.

Title 74 O.S., § 840-6.5(B), **Discharge, suspension or demotion of employee – Notice – appeal – Hearing – Findings**, states in pertinent part, "...The findings of the presiding official shall be final and conclusive upon all questions within their jurisdiction between the parties except as provided for in Sections 317 and 318 of Title 75 of the Oklahoma Statutes. Such decision are subject to judicial review if appealed to the district court within thirty (30) calendar days."

Merit Rule 455:10-3-20(h), **Petitions to rehear, reopen or reconsideration cases; Judicial review,** states "Within 30 calendar days after exhausting all remedies under the Administrative Procedures Act, either party may appeal to a higher court."

You have exhausted all remedies with the Commission. You may appeal to a higher court.

Sincerely,
s/ [signature illegible]
Melanie E. Cherry
Human Resources Programs Manager

ISSUED
FEB -3 2003
OK MERIT PROTECTION
COMM
BY

BEFORE THE MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

MPC 03-076

Undra R. Ware v. Department of Human Services

ORDER

On January 30, 2003, a Petition for Reconsideration, filed by Appellant, came on for consideration by the Commissioners of the Oklahoma Merit Protection Commission (Commission).

FINDINGS

The Commissioners considered and reviewed the available evidence, including the laws and rules governing such issues.

The Commissioners found there was no probable error committed the agency in the proceedings or in its decision such as would be grounds for reversal on judicial review of the final agency order in accordance with 75 O.S., § 317, **Rehearing, reopening or reconsideration of agency decision.**

CONCLUSIONS OF LAW

The Commissioners voted to deny the Petition for Reconsideration.

IT IS THEREFORE ORDERED that the Petition for Reconsideration filed by the [sic] Undra R. Ware, MPC 03-

076, be **DENIED**.

s/ James L. Howard
James L. Howard, Executive Director Oklahoma Merit Protection Commission, 201 N.E. 38th Terrace, Suite 5, Oklahoma City, Oklahoma 73105

copy: Undra R. Ware, Appellant
Richard A. Resetaritz, Assistant General Counsel, DHS
Annita Bridges, Administrative Law Judge

ISSUED
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OK MERIT PROTECTION
COMM
BY

OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

UNDRA R. WARE,	)	
	)	
Appellant,	)	CASE NO. MPC 03-076
vs.	)	
	)	
DEPARTMENT OF HUMAN SERVICES,	)	
	)	
	)	
Appellee.	)	

FINAL ORDER

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on November 6, 2002 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Undra R. Ware, appeared in person and was unrepresented. Appellee, Department of Human Services (hereinafter referred to as "DHS" or "Appellee"), appeared by and through its Counsel, Richard A. Resetritz, Assistant General Counsel, and agency representative Kay Saunders, Institutional Community Program Administrator II. Prior to the start of the hearing, a protective order was entered by the undersigned to maintain the confidentiality of clients referenced in this hearing. That protective order extends to the recordings of the hearing, exhibits offered and admitted, and to this Order, as well.

Appellant was a permanent classified employee working for Appellee when she was discharged effective August 3, 2002 for her actions on April 26, 2002 and on June

1, 2002, allegedly in violation of DHS:2-1-7(g)(2)(D), *Willful Disobedience*; DHS:2-1-7(g)(2)(E), *Insubordination*; and DHS:2-1-7(g)(2)(H), *Discourteous Treatment of Clients, Other Employees or the General Public.*

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with exhibits, which are incorporated herein and made a part hereof. Accordingly, after careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Appellant, Undra R. Ware, had been previously employed as a Direct Care Specialist II at the Laura Dester Shelter in Tulsa for approximately three years and 10 months. On May 26, 2002 Appellant was called in to supervisor Michael Steven Shaw's office to discuss an incident that had occurred the previous day wherein Appellant had asked to be relieved from her responsibilities with assigned residents before the end of her shift so that she could complete her paperwork. During the course of the May 26, 2002 discussion, Appellant admitted that she began talking over supervisor Shaw, in order to make her point, and stated, "You do not know who you are dealing with."Appellant indicated that she did not intend this as a threat. She then turned to supervisor Laverne Miller, who was in the office, and accused her of being lazy, and "sitting on her fat ass". A shouting match occurred between Appellant and supervisor Miller before the incident ended.

On June 1, 2002 Appellant approached supervisor Mary Bowman, upset about a co-worker Appellant believed was not doing her job. Appellant had medical problems that required her to take frequent restroom breaks, and her co-worker, a floater not permanently assigned to any one area

that day, was not available to relieve Appellant. Appellant was upset and wanted to take a "stress" break and go to the "Little House," another building that housed small children and a nursery. Ms. Bowman told her that the "Little House" was not an appropriate place to take a break if she was upset, and authorized Appellant to take her regular 15-minute break, but not a special "stress" break. Appellant wanted a longer break than 15 minutes and decided that if she took a resident with her on break, she could still be considered working, and not on break. Disregarding Ms. Bowman's instructions not to go to the "Little House", Appellant took a 17-year old male resident and had him accompany her to the "Little House."

Soon after Appellant arrived at the "Little House", Ms. Bowman called there and spoke with her on the telephone. According to Appellant's own testimony, Ms. Bowman told her twice to return to her assigned building, Building 'B', and twice Appellant told her she was not coming back. Appellant then told Ms. Bowman she was hanging up, and before Ms. Bowman could conclude the conversation, Appellant hung up on the telephone.

Ms. Bowman again called the "Little House" and this time spoke with Direct Care Specialist Kelly White-Armstrong. She instructed Ms. Armstrong to have the 17-year old male resident to return to Building 'B'. Again, according to Appellant's own testimony, when Ms. Armstrong so informed the youth, Appellant jumped up and grabbed the youth's sleeve, and said no, he was staying there with her. Appellant indicated that she was at the "Little House" approximately 15 to 20 minutes before returning to her work area in Building 'B'.

Appellant was discharged effective August 3, 2002 for violating DHS:2-1-7(g)(2)(D), *Willful Disobedience*; DHS:2-1-7(g)(2)(E), *Insubordination*; and DHS:2-1-

7(g)(2)(H), *Discourteous Treatment of Clients, Other Employees or the General Public*. In this case, the material facts are not in dispute. Appellant acknowledged arguing with supervisors Shaw and Miller on April 26, 2002, trying to talk over Mr. Shaw, and stating to Mr. Shaw, "You do not know who you are messing with." Appellant acknowledged that on June 1, 2002, she went to the "Little House" after supervisor Bowman told her not to go, that she twice told supervisor Bowman she would not return when directed to do so, and that she prevented the 17-year old resident from returning to Building 'B' when supervisor Bowman instructed another co-worker to have him return.

The undersigned Administrative Law Judge find that just cause exists for discipline of Appellant for violating DHS:2-1-7(g)(2)(D), *Willful Disobedience*; DHS:2-1-7(g)(2)(E), *Insubordination*; and DHS:2-1-7(g)(2)(H), *Discourteous Treatment of Clients, Other Employees or the General Public*, and that the discipline imposed did not constitute an abuse of discretion under the facts and circumstances of this case. Within the past two years, Appellant had received oral counseling, an oral reprimand, and a written reprimand for violating DHS:2-1-7(g)(2)(D), *Willful Disobedience*, and had received a written reprimand and suspension without pay for misconduct: abuse, neglect or other mistreatment of Department clients.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

2. Any findings of fact that are properly conclusions of

law are so incorporated herein as conclusions of law.

3. The burden of proof in this case was placed on Appellee to prove its case by a preponderance of the evidence, pursuant to Merit Rule 455:10-9-2(f)(1), and Appellee has met its burden.

4. Merit Rule 455:10-11-16 provides that an employee may be discharged for misconduct, conduct unbecoming a public employee, or any other just cause.

5. DHS:2-1-7(g)(2) provides that disciplinary action shall be imposed for misconduct, including willful disobedience, insubordination, and discourteous treatment of clients, other employees, or the general public.

6. DHS:2-1-7(g)(2)(D) defines *willful disobedience* as the intentional disregard of supervisory directives or willful refusal to comply with such directives.

7. DHS:2-1-7(g)(2)(E) defines *insubordination* as a general course of conduct evidencing disrespect, disdain, or contempt for Department administrators, supervisory personnel, and/or other proper authorities.

8. DHS:2-1-7(g)(2)(H) requires Appellant to treat clients, other employees, and all other persons with respect and courtesy, not violate privacy or personal dignity, harass, or violate constitutional rights.

9. Appellee, Department of Human Services, has shown by a preponderance of the evidence presented at the hearing that Appellant violated DHS:2-1-7(g)(2)(D), (E), and (H) by her actions on April 26, 2002 and on June 1, 2002, that just

cause exists for discipline of Appellant, Undra R. Ware, and that discharge was not unjust.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED.**

DATED this 15th day of November, 2002.

s/Annita M. Bridges
Annita M. Bridges, OBA# 1119
Administrative Law Judge
OKLAHOMA MERIT PROTECTION COMMISSION
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